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In The

Supreme Court of the United States

October Term, 1995

GREGG D. UHLRIG, *et al.*,

Petitioners,

vs.

ROBERT C. HARDER, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

What is required to establish a cognizable constitutional claim against state officials under the "danger creation" theory this Court suggested in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989)?

LIST OF PARTIES

Gregg D. Uhlrig, Executor of the estate of Stephanie Uhlrig

Gregg D. Uhlrig, Individually

Benjamin J. Uhlrig, a minor child

Anika M. Uhlrig, a minor child

Robert C. Harder, Secretary of Kansas Department of Social and Rehabilitative Services

Donna L. Whiteman, Secretary of Kansas Department of Social and Rehabilitative Services

George D. Vega, Commissioner of Kansas Mental Health and Rehabilitative Services

Mani Lee, Director of Kansas Mental Health Programs

Karen Thompson, Superintendent of Topeka State Hospital

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OPINIONS BELOW

The decision of the United States District Court for the District of Kansas, granting summary judgment to the respondents is unpublished. *See* Appendix ("App.") B, 3a-13a. The August 30, 1995 decision of the United States Court of Appeals for the Tenth Circuit affirming the District Court's judgment is published at 64 F.3d 567 (10th Cir. 1995). *See* App. C, 14a-31a. The Tenth Circuit's order denying rehearing and rehearing en banc is unpublished. *See* App. A, 1a-2a.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the Tenth Circuit pursuant to 28 U.S.C. §1254(1). The Tenth Circuit filed its opinion on August 30, 1995. App. C. Petitioners timely filed a petition for rehearing and for rehearing en banc which the Tenth Circuit denied on September 29, 1995. App. A. This petition for a writ of certiorari has been filed within ninety days of that date. Sup. Ct. R. 13.1, .3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause provides that no State shall

> deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. Amend. XIV.

42 U.S.C. § 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be

> subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Procedural History

Petitioner Gregg Uhlrig, as the executor of the estate of Stephanie Uhlrig, and for himself and the couple's two minor children as individuals, filed this suit against respondents, various Kansas officials responsible for the administration of state mental hospitals, in the United States District Court for the District of Kansas in 1993. In the complaint, petitioners alleged a substantive due process claim under 42 U.S.C. § 1983 and pendent state law tort claims. The District Court dismissed the state law claims, dismissed as plaintiffs all but Gregg Uhlrig in his capacity as executor, and granted summary judgment to respondents on the § 1983 claim.

Petitioners appealed only the District Court's ruling on the § 1983 claim. In a published opinion, *Uhlrig, et al. v. Harder, et al.*, 64 F.3d 567 (10th Cir. 1995), the Tenth Circuit affirmed the judgment in respondents' favor. App. C. Petitioners filed a timely petition for rehearing and rehearing en banc which the Tenth Circuit denied on September 29, 1995.

B. Statement of Facts

1. *The Murder of Stephanie Uhlrig*

Stephanie Uhlrig worked as a music and activity therapist at the Topeka State Hospital in Topeka, Kansas. App. C, 17a. One of the hospital's patients, Kenneth Waddell, had been placed in

the custody of state mental health authorities after having been found not guilty by reason of insanity of a charge of aggravated battery for the multiple stabbing of a college student. *Id.* On April 1, 1987, Waddell was placed in the Topeka State Hospital in the Adult Forensic Ward (referred to as "AWL"), a special unit reserved for higher risk patients and segregated from the other units in the hospital. *Id.* at 17a. After three months in AWL, Waddell was placed in a regular unit until, approximately a year later, he left the hospital without permission and the County Attorney who originally prosecuted him complained and requested that the hospital provide greater security. *Id.* Waddell was transferred back to the AWL unit where, in March, 1991, he had a physical altercation with a staff member and was placed in restraints. *Id.*

Due to budgetary concerns, state administrators decided to close the AWL unit. *Id.* The director of mental health services informed administrators that, because the AWL unit had been specially created to avoid mixing "murderers with my mother" and to provide a highly structured environment for high risk patients, closing the AWL should be done only with a careful phase-out period. *Id.* Shortly thereafter, officials decided to phase out the AWL unit. *Id.* at 18a. As a result of the phase-out, Waddell was placed in a general unit where he assaulted and raped a female patient. *Id.*

Waddell then was transferred to another unit in the general population, the unit where Stephanie Uhlrig worked as an activity therapist. *Id.* Uhlrig's supervisor at that time called Uhlrig's attention to Waddell's background and Uhlrig had access to Waddell's file. *Id.* at On February 23, 1992, Uhlrig and another therapist took Waddell and several other patients off the hospital grounds to see a movie. After they returned to the hospital, Waddell apparently cornered Uhlrig alone, and attacked and killed her. *Id.* at 19a. Uhlrig's body was found in a bathroom in a building on the hospital grounds. *Id.*

Petitioner Gregg Uhlrig, as the executor of the estate of Stephanie Uhlrig, and for himself and the couple's two minor children as individuals, filed this suit against respondents, various Kansas officials responsible for the administration of state mental hospitals, in the United States District Court for the District of Kansas in 1993. *Id.* In the complaint, petitioners alleged a substantive due process claim under 42 U.S.C. § 1983 and pendent state law tort claims. *Id.* The District Court dismissed the state law claims as barred by the Kansas workers' compensation laws and respondents' discretionary function immunity under Kansas law. *Id.* at The District Court also dismissed all but Gregg Uhlrig in his capacity as executor of Stephanie Uhlrig's estate as plaintiffs. *Id.* Finally, the District Court granted summary judgment to respondents on the §1983 claim, concluding that respondents' actions were not reckless and, in any event, were protected by qualified immunity. *Id.*

2. *The Tenth Circuit's Disposition of the Appeal*

Petitioners appealed only the District Court's ruling on the § 1983 claim to the Tenth Circuit. In *Uhlrig, et al. v. Harder, et al.*, 64 F.3d 567 (10th Cir. 1995), the Tenth Circuit affirmed the judgment in respondents' favor. The Tenth Circuit began its analysis of the substantive due process claim by declaring that in order to state a substantive due process claim "Plaintiff must demonstrate that the state acted in a manner that 'shock[s] the conscience.'" App. C, 20a (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) (quoting *Rochin v. California*, 342 U.S. 165, 172) (1952)).

The Tenth Circuit observed that state actors generally are not responsible for harms caused by private actors, deriving that proposition from this Court's decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). *Id.* at 21a. The Tenth Circuit declared, however, that this Court in *DeShaney*

recognized the two exceptions to the rule: (1) the special relationship doctrine and (2) the "danger creation" theory. *Id.* at 21a-22a. The Tenth Circuit dismissed the notion that the respondents, as Stephanie Uhlrig's employer, in this case had a special relationship to her which would give rise to liability under the first *DeShaney* exception, *id.* at 22a, and, indeed, petitioners never made such a contention. Instead, the Tenth Circuit focused on the "danger creation" exception *Id.* Pointing out that "the conduct complained of in the instant case was committed by a private third party," *id.* at 20a, the Tenth Circuit declared that "Plaintiff must demonstrate . . . that the state recklessly created the danger that caused the constitutional violation." *Id.* at 20a-21a (citing *Graham v. Independent School Dist. No. I-89*, 22 F.3d 991, 994-95 (10th Cir. 1994), which in turn relied upon *DeShaney*). The Tenth Circuit stated that the "classic case" of a state official incurring liability under a danger creation theory was *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990), in which police officers were held liable under §1983 on a substantive due process claim when they impounded the plaintiff's car and abandoned her in a high crime area at 2:30 a.m., resulting in her being assaulted by third parties. *Id.* at 22a.

The Tenth Circuit opined that, because many state activities have the potential to create some danger, liability under §1983 arises only when the danger rises to the level of being "a special danger." *Id.* at 22a-23a. Moreover, in the Tenth Circuit's view, petitioners were required to establish not only that respondents recklessly or intentionally created a special danger to Stephanie Uhlrig, but also that respondents' conduct "shocks the conscience." *Id.* at 23a. The Tenth Circuit derived its "shocks the conscience" requirement from this Court's decision in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992). App. C, 23a.

Ultimately, the Tenth Circuit phrased the standard for a

"danger creation" claim as follows: "Did Defendants Recklessly Create A Special Danger To Uhlrig That Shocks the Conscience?" *Id.* at 26a. Attempting to merge this Court's recent substantive due process decisions, the Tenth Circuit declared that petitioners had to demonstrate the following five elements in order to state a cognizable, substantive due process claim based on the "danger creation" theory in a §1983 suit against state officials:

> (1) [that] Uhlrig was a member of a limited and specifically definable group; (2) Defendants' conduct put Uhlrig and the other members of that group at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking.

Id. at 26a.

Based on its reading of the evidence before it, the Tenth Circuit opined that petitioners had failed to raise a genuine dispute of fact on the second, fourth and fifth elements. *Id.* at 27a. In the Tenth Circuit's view, the record established that the respondents did not put Uhlrig at substantial risk of serious harm, did not act recklessly and did not act in a "conscience shocking" manner. Therefore, the court affirmed the District Court's grant of summary judgment.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE CLEANLY PRESENTS THE IMPORTANT AND UNRESOLVED ISSUE OF WHAT IS REQUIRED TO ESTABLISH A COGNIZABLE CONSTITUTIONAL CLAIM AGAINST STATE OFFICIALS UNDER THE "DANGER CREATION" THEORY THIS COURT SUGGESTED IN *DESHANEY V. WINNEBAGO COUNTY DEPT. OF SOCIAL SERVICES*, 489 U.S. 189 (1989).

A. Introduction

In *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196-97 (1989), this Court affirmed the general proposition that state actors ordinarily have no liability for harms caused by private actors. The plaintiffs in *DeShaney* were a young boy and his mother who sought to hold state officials liable in a §1983 suit after the boy's father brutally beat him, severely and permanently injuring the child. State social services officials were aware of problems in the boy's home and had investigated the situation but did not remove the boy from his father's custody until after the tragic beating. The plaintiffs' theory was that the state had a constitutional duty to protect the boy, at least once the state became aware of the situation.

This Court rejected that claim, concluding that substantive due process principles ordinarily do not impose upon state officials a constitutional duty to protect persons from harm that may be caused by private parties. 489 U.S. at 194-97. The Court observed that there are exceptions to the general "no duty" rule, the primary one being the existence of a "special relationship" between the victim and the state officials, for example, when state

officials have an inmate or mental patient in their custody. *Id.* at 197-201. More importantly for purposes of this case and the issues it raises, the Court emphasized that the state officials in *DeShaney* "*played no part in creating*" the danger to the boy. *Id.* at 197 (emphasis added). The Court observed near the end of its opinion that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation*, nor did it do anything to render him any more vulnerable to them." *Id.* at 201 (emphasis added). The Court in *DeShaney* did not expand upon the "danger creation" notion beyond the two statements quoted above, perhaps because the Court easily concluded that, even if such an exception exists, it would not have applied in *DeShaney*, or perhaps because the Court did not intend to endorse or recognize such an exception.

Many lower federal courts have interpreted the foregoing statements as acknowledging and endorsing a "danger creation" exception to the general "no duty" rule for state actors. *See, e.g., L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2442 (1993). As one respected federal judge has articulated the theory behind the "danger creation" exception, "[i]f a state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982) (Posner, J.). A few lower federal courts, however, have questioned whether the exception actually exists. *See, e.g., Leffall v. Dallas Indep. School Dist.*, 28 F.3d 521, 530 (5th Cir. 1994) (questioning whether the Court intended in *DeShaney* to recognize a separate and independent "danger creation" exception to the "no duty" rule or was merely describing the nature and scope of the "special relationship" exception).

This case squarely raises the "danger creation" exception and required the lower courts to grapple with the nature and scope

of this important potential exception to the general "no duty" rule. Unlike *DeShaney*, the state officials in this case did take affirmative actions that created the danger that Kenneth Waddell would harm Stephanie Uhlrig. Here, in contrast to *DeShaney*, state officials affirmatively placed the potential injurer in close proximity to his victim. State officials were not simply aware that someone posed a danger to Stephanie Uhlrig and failed to intervene; they put Waddell in proximity to Uhlrig, knowing full well his dangerous and violent propensities. This case therefore provides the Court with an opportunity to address the "danger creation" exception and provide much needed guidance to the lower courts and the practicing bar.

This Court has never directly or extensively addressed the "danger creation" theory. Indeed, other than in *DeShaney* itself, it does not appear that the Court has ever even mentioned the theory, much less articulated its nature and scope. Taking the Court's suggestion of the existence of such an exception seriously, however, the practicing bar has filed and litigated such claims and the lower courts have struggled with the difficult issues that these claims present. That the lower courts have adopted differing approaches and reached different results in factually similar cases, as demonstrated below, is beyond dispute. That the bar is uncertain what substantive due process claims, if any, in these circumstances are or should be meritorious also is indisputable. For these reasons, petitioners respectfully request that the Court take this opportunity to resolve some of the uncertainty surrounding the "danger creation" exception to the rule of non-liability for state officials who fail to prevent harm by private parties. This case cleanly presents the essential legal issues against the background of a fully developed and extensive factual record. Moreover, the Court will have the benefit of reviewing a thorough, published decision written by a respected federal judge who was doing his best to piece together potentially relevant decisions of this Court in order to derive the appropriate legal standards.

B. The Lower Courts And The Practicing Bar Require This Court's Guidance Regarding the Nature and Scope of the "Danger Creation" Exception to the "No Duty" Rule.

Although many lower courts have confronted and grappled with the "danger creation" exception to the general "no duty" rule, including the Tenth Circuit on several occasions, no other circuit has adopted the five element test that the Tenth Circuit relied upon in this case. In particular, no other Court of Appeals has engrafted the general substantive due process "shocks the conscience" standard, as articulated in cases such as *Rochin v. California*, 342 U.S. 165, 172 (1952) (where police officers forcibly and against the plaintiff's will pumped his stomach), and *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) (where a decedent's widow sued her husband's employer, the city, in a §1983 suit alleging failure to maintain a safe work environment), onto the "danger creation" exception to the "no duty" rule. In essence, the Tenth Circuit's decision requires a plaintiff in petitioners' position to prove that (1) the defendant acted *recklessly* (2) in creating a *special* danger which (3) *shocks the conscience*.

There are at least two potential faults with the Tenth Circuit's standard. First, nothing in this Court's *DeShaney* decision suggests that the Court envisioned or intended the merging of substantive due process concepts that have been developed in two very different contexts. Rather, *DeShaney* reads as though, and it would seem logical to assume that, when state officials through their affirmative actions recklessly or intentionally create a significant danger to others, their conduct goes beyond the bounds of the constitutionally acceptable. In other words, reckless or intentional affirmative conduct that creates a significant danger to others "shocks the conscience." The Tenth Circuit, however, suggests that even if state officials create a danger to others and do so recklessly or even intentionally, there

is a separate and additional (and apparently higher) requirement that the resulting situation and harm "shocks the conscience."

The Tenth Circuit purported to derive this additional "shocks the conscience" requirement that it imposed in "danger creation" cases from this Court's decision in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992). In *Collins*, the decedent's widow sued his municipal employer under §1983 after her husband was asphyxiated while working in a city sewer. The plaintiff alleged that the city's failure to train and warn its employees with regard to safety devices and measures violated her husband's substantive due process right to a safe working environment. 503 U.S. at 125-26. Not surprisingly, this Court rejected that claim. Quoting *DeShaney*, the Court noted that state officials generally have no federal constitutional duty to protect persons from harm and that the employment relationship—because it is entered into voluntarily and does not involve state "custody" of employees—does not create a "special relationship" that falls within the first *DeShaney* exception. *Id.* at 126-28. Turning then to general substantive due process principles, the Court easily and unanimously concluded that the city's alleged failure to train or warn its employees could not be characterized as "conscience shocking, in a constitutional sense." *Id.* at 128.

Collins, unlike this case and unlike *DeShaney*, does not involve harm caused by third parties. Danger creation cases such as this case involve that very situation where state officials have acted recklessly or intentionally to create the significant danger that a third party will harm the plaintiff. Because of this critical difference between the typical "danger creation" case and the situation in *Collins*, it was only proper for this Court to resort to the "shocks the conscience" standard of *Rochin v. California*, 342 U.S. 165 (1952), in evaluating the plaintiff's substantive due process claim in *Collins*. Although *Collins* and *DeShaney* both ultimately involved substantive due process issues, they were

very different types of substantive due process cases. At bottom, the plaintiff in *Collins* was not making a *DeShaney* claim but, rather, seeking the imposition of an even more expansive constitutional duty on state officials.

The second problem with the Tenth Circuit's test is that, even assuming there is merit in the Tenth Circuit's coupling of the "danger creation" theory and the "shocks the conscience" standard, it provides virtually no meaningful guidance to lawyers and clients trying to decide whether to file and litigate such claims or to the lower federal courts which ultimately must rule on these claims. Defining "recklessness" is difficult enough for the practicing bar and the lower courts, but add the undefined notions of "special" danger and "shocks the conscience" and the result is an indecipherable judicial test that provides no clarity and no guidance. From the standpoint of the practicing bar and the lower federal courts, it might be better to eliminate the "danger creation" exception altogether, rather than to create standards that provide no guidance and make it impossible to identify the cases which might actually satisfy the standard.

Perhaps that is why no other Court of Appeals has adopted the Tenth Circuit's standard and, in fact, have reached results directly contrary to *Uhlrig* on virtually identical facts. The most striking contrast to the Tenth Circuit's approach in this case is provided by the Ninth Circuit's decision affirming potential liability in *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2442 (1993). In *Grubbs*, a registered female nurse employed by the state of Oregon to work in a medium security prison was raped and terrorized by a male inmate assigned to be her assistant in the prison's medical clinic. The defendants, state employees who were the nurse's supervisors at the prison, led her to believe that she would not work alone with violent sex offenders. Nonetheless, the assistant they chose for her was a violent sex offender who had failed all treatment

programs at the prison and was viewed as posing a significant risk to any female. Once alone with the nurse in the clinic, the inmate raped and terrorized her. The nurse sued the defendants under §1983 on the theory that they intentionally or recklessly placed her in a position of known danger, *i.e.*, the "danger creation" theory. The District Court dismissed the suit but the Ninth Circuit reversed.

Relying on this Court's statements in *DeShaney* that the state officials in *DeShaney* played no part in creating the danger to the young boy, the Ninth Circuit concluded that "*DeShaney* did not rule that custody was required where the state affirmatively causes the harm." 974 F.2d at 121. According to the Ninth Circuit, "*DeShaney* thus suggests that had the state created the danger, Joshua might have recovered even though he was not in custody." *Id.* Applying the danger creation exception to the case before it, the Ninth Circuit easily concluded that the defendants—based on the allegations in the complaint — "used their authority as state correctional officers to create an opportunity for [the inmate] to assault [the nurse] that would not otherwise have existed." *Id.*

The Ninth Circuit then discussed *Collins v. City of Harker Heights*, which had been decided more than four months prior to the argument and six months prior to the decision in *Grubbs*. But, unlike the Tenth Circuit, the Ninth Circuit did not inquire whether the defendants' affirmative conduct "shocked the conscience." Indeed, the Ninth Circuit distinguished *Collins* on the ground that the plaintiff in *Grubbs*, unlike the widow in *Collins*, "alleges that the Defendants took affirmative steps to place her at significant risk, and that they knew of the risks. Contrary to Defendants' arguments, *Collins* actually supports [the nurse's] claim." *Id.* at 122. Ultimately, the Ninth Circuit's standard is a relatively simple one: Did the defendants recklessly or intentionally engage in affirmative acts which created a significant danger to the plaintiff?

The Tenth Circuit's "reckless creation of a special danger which *shocks the conscience*" tests stands in stark contrast to the *Grubbs* standard. The facts of *Grubbs* are strikingly similar to the facts of this case and, more importantly, the law on which the Ninth Circuit relied in deciding *Grubbs* is precisely the same law on which the Tenth Circuit relied in deciding *Uhlrig*—this Court's decisions in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), and *Collins v. City of Harker Heights*, 503 U.S. 115 (1992). The legal standard the Ninth Circuit applied in *Grubbs* would, if applied to this case, compel reversal of the grant of summary judgment in respondents' favor. Moreover, all other circuits to consider the "danger creation" exception have adopted a standard identical or similar to the *Grubbs* standard. *See, e.g., Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (state police officers who impounded plaintiff's car and left her stranded in dangerous neighborhood at 2:30 a.m. resulting in her being assaulted by criminals had potential liability under danger creation theory), *cert. denied*, 111 S. Ct. 341 (1990); *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989) (prison officials who operated inmate work squad composed of violent offenders in populated area had potential liability under danger creation theory when inmates in the squad kidnapped and terrorized a private citizen); *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990) (county officials' affirmative act of preventing private individuals from attempting rescue of drowning victim potentially violated victim's substantive due process rights); *Nishayama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987) (en banc) (county officials who permitted inmate to drive police car had potential liability for substantive due process violation when inmate used car to pull over motorist and then beat her to death). Even when denying such claims on the merits, the Courts of Appeal have looked simply at whether the state actors recklessly or intentionally created a significant danger that third parties would harm the plaintiff. *See, e.g., Gregory v. City of Rogers*, 974 F.2d 1006 (8th

Cir. 1992) (en banc) (finding no liability when a police officer arrested the "designated driver" for a group of friends who were out drinking and one of the intoxicated passengers then attempted to drive the car, resulting in a fatal accident); *Johnson v. Dallas Indep. School Dist.*, 38 F.3d 198 (5th Cir. 1994) (finding no liability when a non-student fired a gun on school grounds and a stray bullet struck and killed a student).

Petitioners respectfully request that this Court act now to prevent further waste of private and judicial resources in substantive due process/"danger creation" cases. As the Court can see from the record in this case, substantial resources have been expended on a case that has proved to be doomed from the start under the Tenth Circuit's rigorous new standard. No prudent lawyer in the Tenth Circuit would have taken and litigated this case had the law clearly imposed such a high burden of proof on the plaintiff at the time this case was filed. Yet, as evidenced by the Ninth Circuit's opinion in *L.W. v. Grubbs*, a prudent lawyer in that circuit would be required ethically to inform a client who presented the same facts as in *Uhlrig* that the client had a triable claim. Moreover, it is unclear what advice a prudent lawyer in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits should give to a client on facts similar to this case. It would be impossible for counsel or a district judge in one of those circuits to reconcile *Grubbs* and *Uhlrig*. Absent clarification of the governing legal standard, the real and enormous burden that the uncertainty surrounding the "danger creation" exception imposed on the parties in *Uhlrig* and the courts of the District of Kansas and the Tenth Circuit surely will be imposed on new parties and other courts in future cases. Yet continuing to impose that unfortunate and avoidable consequence will not lead to a more clearly framed issue than what presents itself in this case.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court grant this petition for a writ of certiorari and set this case for plenary review.

Respectfully submitted,

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APPENDIX A — OPINION ON PETITION FOR REHEARING AND REHEARING IN BANC OF THE TENTH CIRCUIT COURT OF APPEALS DATED SEPTEMBER 29, 1995

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-3190

GREGG D. UHLRIG, Individually and as Executor of the Estate of Stephanie Uhlrig; BENJAMIN J. UHLRIG, a minor child; ANIKA M. UHLRIG, a minor child,

Plaintiffs-Appellants,

v.

ROBERT C. HARDER, acting in his individual personal capacity and as Secretary of the Department of Social and Rehabilitative Services; DONNA L. WHITEMAN, acting in her individual personal capacity and as Secretary of the Department of Social and Rehabilitative Services; GEORGE D. VEGA, acting in his individual personal capacity and as Commissioner of Mental Health and Rehabilitative Services; MANI LEE, acting in his individual personal capacity and as Director of Mental Health Programs; KAREN THOMPSON, acting in her individual personal capacity and as Superintendent of Topeka State Hospital,

Defendants-Appellees,

STATE OF KANSAS,

Defendant.

Appendix A

ORDER
Entered September 29, 1995

Before EBEL and KELLY, Circuit Judge, and BRATTON,* District Judge.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By s/ L. Balzano
Deputy Clerk

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* The Honorable Howard C. Bratton, Senior District Judge, United States District Court for the District of New Mexico, sitting by designation.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS FILED MAY 17, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 93-1009-PFK

GREGG D. UHLRIG, Individually and as Executor of the Estate of Stephanie Uhlrig; BENJAMIN J. UHLRIG, a Minor Child; and ANIKA M. UHLRIG, a Minor Child,

Plaintiffs,

vs.

ROBERT C. HARDER, Acting in His Individual Personal Capacity and as Secretary of the Department of Social and Rehabilitative Services; DONNA L. WHITEMAN, Acting in Her Individual Personal Capacity and as Secretary of the Department of Social and Rehabilitative Services; GEORGE D. VEGA, Acting in His Individual Personal Capacity and as Commissioner of Mental Health and Rehabilitative Services; MANI LEE, Acting in His Individual Personal Capacity and as Director of Mental Health Programs; KAREN THOMPSON, Acting in Her Individual Personal Capacity and as Superintendent of Topeka State Hospital; and THE STATE OF KANSAS,

Defendants.

Appendix B

MEMORANDUM AND ORDER

The present action has been brought by the heirs of Stephanie Uhlrig and by the administrator of her estate against five administrators of the mental health system of the State of Kansas. After extensive discovery, the defendants have moved for summary judgment, and a hearing on the arguments relating to these motions was held May 2, 1994.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the court must examine all evidence in a light most favorable to the opposing party. *McKenzie v. Mercy Hospital*, 854 F.2d 365, 367 (10th Cir. 1988). The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a reasonable doubt. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985). The moving party need not disprove plaintiff's claim; it need only establish that the factual allegations have no legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319, 1323 (10th Cir. 1987).

In resisting a motion for summary judgment, the opposing party may not rely upon mere allegations or denials contained in its pleadings or briefs. Rather, the nonmoving party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party has carried its burden under Rule 56(c), the party opposing summary judgment

must do more than simply show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*' " *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P. 56(e)) (emphasis in *Matsushita*). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Stephanie Uhlrig was hired as a musical and activity therapist at the Topeka State Hospital on May 7, 1987. She had previously interned at the hospital under the training of Sally Schaffer. Uhlrig was advised during her internship that patients at the hospital were assaultive and potentially dangerous, and that hospital workers faced the possibility of injury. Uhlrig received Mandt training during her employment, which is designed to help employees reduce the risks of injury through heightened self-awareness, improved judgment skills, and an enlarged repertoire of responses to hostility.

One of the patients at the Topeka State Hospital was Kenneth Waddell. Waddell had been charged with aggravated battery for stabbing a coed in Emporia, Kansas in 1984. Found not guilty by reason of insanity under K.S.A. 22-3428, Waddell had been placed in the custody of the Kansas Department of Social and Rehabilitation Services (SRS) and sent to the Larned State Security Hospital in March of 1985. Waddell was transferred from Larned to the Topeka State Hospital on April 1, 1987, and placed in the hospital's AWL Unit because of a policy that new admissions from Larned required a period of adjustment.

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Waddell's treatment team recommended placement on the regular psychiatric ward in June, 1987. Waddell was placed in one of the hospital's regular psychiatric wards, Rappaport South, on July 22, 1987. He remained in regular psychiatric units for slightly over one year. During this time he received recreation services from the leisure staff, including recreational, job, and music therapy. He also received off-grounds privileges, which included shopping, movies, and fishing.

In July of 1989, Waddell was reportedly upset that his personal belongings had been confiscated by the hospital staff. Shortly afterward, Waddell went AWOL from the hospital, but he subsequently returned voluntarily. Waddell was then placed under an AWOL Precaution, an order given to the nursing staff to be careful of a patient's propensity to run away. This is a medical or clinical determination by the treating physician.

On July 19, 1989, the hospital received a letter from Lyon County Attorney Rodney Symmonds complaining of Waddell's AWOL. As a result of the Symmonds letter, and in order to reduce the chances of a repeat of Waddell's flight, Dr. Ali Baser, the hospital's Clinical Director, decided to transfer Waddell back to the AWL Unit. Waddell made no attempt to go AWOL again. The AWOL precautions were removed by Dr. Benjamin Artiles, the AWL Unit's physician, in November, 1990.

On March 3, 1991, Waddell had a physical altercation with a staff member and was placed in restraint. No other precautions were made by the treatment team. Shortly thereafter, Waddell met with Dr. Baser, who told Waddell he would remain in the AWL Unit. When the AWL Unit was closed on June 12, 1991, Waddell was returned to Rappaport South. He was not then on any AWOL Precaution. There were no warnings in Artile's note transferring Waddell to Rappaport South.

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Dr. Baser resigned his position on July 9, 1991; Dr. Artiles was then made Acting Clinical Director. On October 1, 1991, Waddell was transferred to the Boisen South Unit, because his treatment team had determined that he needed a more challenging treatment environment and that his condition might otherwise deteriorate. The Boisen South Unit was aware of Waddell's history at the hospital.

Stephanie Uhlrig had access to Waddell's medical records on the Boisen South Unit. She made entries in his records on four occasions between late 1991 and early 1992.

Defendant Karen Thompson was made Acting Superintendent of the Topeka State Hospital on April 12, 1991, after the decision had been made to close the AWL Unit. She served in that position until February 2, 1992. Thompson had no authority to close a unit of the hospital, or to create an adult forensic unit such as AWL. She is not licensed to provide medical treatment and did not participate in any diagnosis or evaluation of Waddell. She relied upon the expertise and discretion of the hospital's medical and legal staff in transferring Waddell from the AWL Unit. Thompson had no indication that Waddell was the source of any difficulty and had received no complaints of his behavior. She did not personally supervise Uhlrig or have any personal contact with her.

Defendant Robert Harder was appointed Acting Secretary of SRS on January 14, 1991. He remained in this position for about a month. Defendant Donna Whiteman replaced Harder, and continues to serve as Secretary to the present time. Defendant George Vega was appointed Acting Commissioner of Mental Health and Retardation Services in June, 1991.

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Vega, Harder and Whiteman have never met Waddell nor have they reviewed any of his medical records. They have never been consulted or advised about any of the treatment goals or plans held by Waddell's treatment teams, never talked with Uhlrig about any of Waddell's treatment, and have no knowledge of Waddell ever threatening Uhlrig. They have made no diagnosis, evaluation, or prescription for Waddell's treatment.

Harder is not a medical doctor, nor does he have any training in the field of psychiatry. His sole responsibility was budgetary, and he played no role in determining which of the hospital's units was closed. At the time of the decision to close the AWL Unit, Whiteman was serving in the Kansas Legislature.

Defendant Dr. Mani Lee was employed by SRS as Director of Mental Health Programs. He has been trained in social work and holds a doctorate in adult development from the Kansas State University Department of Education. He assists his supervisor, the Commissioner of Mental Health and Retardation. The commissioner manages the budgets of various state hospitals and supervises the heads of each hospital.

In February of 1991, Dr. Lee learned that as a result of a meeting of the Kansas Senate Ways and Means Subcommittee, there would be significant cuts in the Topeka State Hospital's budget, cuts requiring the elimination of 44 full-time employees. Upon direction of the commissioner, Lee met with the hospital superintendent and other senior staff. He also participated in several meetings with the legislature and the governor in a futile attempt to avert the proposed cuts. The possibilities discussed at these meetings included closing the Adolescent Unit or the Rappaport South Unit, cutting back on the Menninger, Chaplaincy, Nursing Education, or Psychology Training

Programs. The participants at the meeting also contemplated an across the board cut of the hospital's staff employees.

The hospital's Executive Committee concluded that the proposed cuts required the closure of one of the hospital's units. The committee decided to close AWL, transferring eligible patients to other institutions. In deciding which patients to transfer, the AWL Treatment Team met with the hospital's Patient Care Consultation Team (PCCT). The PCCT is a standing committee composed of the heads of the hospital's departments. The AWL Team also consulted with the hospital's nursing staff. Factors considered included the availability of alternate space on other wards, the number of aggressive patients, prior ward assignments, the familiarity of the staff of other wards with the AWL patients, and each patient's need for special attention.

Waddell was not described by the AWL Team as highly or very assaultive, as a poor patient. He was not at this time subject to any AWOL or Assaultive Precautions. Eleven AWL patients were transferred. Waddell was not considered legally eligible for transfer, according to the hospital's attorney, Jan Maxwell, because of the district court judgment of not guilty by reason of insanity.

The legislature eventually reduced the hospital's budget, not only by the threatened amount, but by an additional six positions. The legislature later restored some funding to the hospital, but not enough to continue the AWL program. In reducing the hospital's funding, the legislature set no guidelines in how or what to cut. The legislature left the determination of how to meet the required budget cuts to the discretion of SRS and hospital staff.

On February 23, 1992, Uhlrig and another therapist, Robin Figgs, took Waddell and other patients off grounds to watch a

movie. Upon returning, Figgs dropped Uhlrig and the patients off at the entrance to the hospital's Schlagle Building. The Schlagle Building, however, had been closed between 2:30 and 6:00 p.m. that day. Uhlrig unlocked the building to allow a female patient to use the restroom. She relocked the building after the patient left, but then unlocked it again and allowed Waddell to enter.

The other therapist returned after fueling the van, and located two additional staff members in the Schlagle Building's administrative office. They left about 5:00 p.m. Uhlrig's body was found in the men's restroom about 15 minutes after the building was reopened. Waddell was subsequently convicted of first degree murder. Uhlrig's estate received $30,441.20 in worker's compensation benefits. She was survived by her husband Gregg and her two children, Benjamin and Anika.

The defendants have raised a number of defenses in their motions for summary judgment. As stated more fully herein, the court finds that the arguments presented by the defendants are correct, and that summary judgment should issue in favor of the defendants.

All defendants argue that the plaintiffs' claims are barred by the Eleventh Amendment, and that the present action — which includes claims by Stephanie Uhlrig's heirs — has not been brought by the proper parties. The plaintiffs concede that under the Eleventh Amendment, their federal claims against the defendants in their official capacities are barred. They contend, however, that the defendants may be liable in their individual capacities for the acts committed in the course of their employment.

As to the question of the proper parties in the present action, the plaintiffs stress that Gregg Uhlrig properly appears in his

capacity as administrator of Stephanie Uhlrig's estate. *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990). The present action also names as plaintiffs, however, Gregg Uhlrig and the Uhlrig children in their capacities as survivors of Stephanie Uhlrig. The court finds that these are not proper parties to the present action. The plaintiffs' reliance on *Trujillo v. Board of County Com'rs*, 768 F.2d 1186 (10th Cir. 1985) is mistaken; the right recognized in *Trujillo* requires an intent on the part of the defendant to interfere with the family relationship itself. Here the record is devoid of any indication of an intent on the part of the defendants to interfere with the family association. Accordingly, the claims of the heirs will be dismissed. *Apodaca v. Rio Arriba County Sheriff's Dept.*, 905 F.2d 1445 (10th Cir. 1990).

The next issue is whether the plaintiffs have presented a colorable claim of deprivation of due process under Section 1983. It has been held that there can be no due process violation for failing to protect a person against private violence. *DeShaney v. Winnebaqo County Dept. of Soc. Serv.*, 489 U.S. 189, 196 (1989). The Supreme Court has held that the constitution does not impose a duty upon the state to provide employees with minimal levels of workplace safety. *Collins v. City of Harker Heights*, 503 U.S. __, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). *See Walker v. Rowe*, 791 F.2d 507 (7th Cir.), *cert. denied*, 479 U.S. 994 (1986).

The plaintiffs argue that liability may exist where there is evidence that the defendants acted recklessly with regard to public safety, citing decisions such as *Medina v. City and County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992); *Archuleta v. McShan*, 897 F.2d 495, 499 (10th Cir. 1990); *Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988). However, the court finds no evidence of recklessness on the part of the administrators named as defendants herein. There is no evidence of any knowledge by

the defendants of the dangerous propensities of Waddell. There is no evidence that the defendants willfully concealed the presence of a known danger from Stephanie Uhlrig. *Cf. Cornelius v. Town of Highland Blake*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987).

In signing a copy of her job description, Uhlrig had acknowledged the potential danger inherent in her job. The plaintiffs emphasize that portion of Uhlrig's job description which states that her position was one of "minimal hazards." As a general matter, this may be true, but the description also clearly and explicitly warns that the danger faced by workers may increase in some cases. The description indicates the potential for serious hazards, acknowledging the possibility that "a patient may become aggressive or combative." The description states, under the heading "Consequences of Actions and Decisions," that the erroneous handling of a patient "could result in injury to client/patient and staff."

There is no evidence in the present case that the defendants recklessly placed Stephanie Uhlrig's life at risk by ignoring a known danger. The defendants are administrators charged with the operation of the state mental health system. They are not treating physicians with knowledge of individual patient histories. The court finds that the plaintiffs' claims pursuant to 42 U.S.C. § 1983 are without merit.

The court further finds that the defendants in any event would be entitled to the protections of qualified immunity. *See Bell v. Wolfish*, 441 U.S. 520, 547 (1979). The Seventh Circuit has observed that there is "no constitutional right to be protected by the state against being murdered by criminals or madmen."

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Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). The plaintiffs have presented nothing to indicate that any of the defendants violated any clearly established law in deciding, in the face of significant spending cuts, to close a psychiatric ward of a state hospital. To the contrary, it would appear that broad discretion is necessary in determining how to meet such administrative and financial decisions. Accordingly, the court finds that the plaintiffs should be entitled to qualified immunity.

The defendants have also moved for summary judgment on the various state tort law claims which have been advanced herein, arguing both that such claims are barred under the worker's compensation laws and that they possess discretionary immunity pursuant to K.S.A. 75-6104(e). The plaintiffs' response brief makes no attempt to refute either argument. The court will grant summary judgment on plaintiffs' state law claims.

IT IS ACCORDINGLY ORDERED this 16th day of May, 1994, that the motions for summary judgment of the defendants (Dkt. Nos. 161, 163, 164 & 167) are hereby granted.

s/ Patrick F. Kelly
PATRICK F. KELLY, CHIEF JUDGE

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED AUGUST 30, 1995

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 94-3190

GREGG D. UHLRIG, Executor of the Estate of Stephanie Uhlrig, Deceased; GREGG D. UHLRIG, Individually; BENJAMIN J. UHLRIG, a minor child; and ANIKA M. UHLRIG, a minor child,

Plaintiffs-Appellants,

v.

ROBERT C. HARDER, acting in his individual personal capacity and as Secretary of the Department of Social and Rehabilitative Services; DONNA L. WHITEMAN, acting in her individual personal capacity and as Secretary of the Department of Social and Rehabilitative Services; GEORGE D. VEGA, acting in his individual personal capacity and as Commissioner of Mental Health and Rehabilitative Services; MANI LEE, acting in his individual personal capacity and as Director of Mental Health Programs; and KAREN THOMPSON, acting in her individual personal capacity and as Superintendent of Topeka State Hospital,

Defendants-Appellees,

The STATE of KANSAS,

Defendant.

Appendix C

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 93-CV-1009)

William J. Skepnek of Stevens, Brand, Golden, Winter & Skepnek, Lawrence, Kansas, (Scott J. Bloch of Stevens, Brand, Golden, Winter & Skepnek, Lawrence, Kansas and Daniel M. Welch of Carpenter Professional Association, Topeka, Kansas, with him on the briefs) for Plaintiffs-Appellants.

Michael George, Chief of Litigation, Department of Social and Rehabilitative Services, Topeka, Kansas (Kenneth R. Smith, Litigation Attorney, Department of Social and Rehabilitative Services, Topeka, Kansas, Hal E. DesJardins, Topeka, Kansas, and Deborah Purce-Jones, Jones & Jones, Topeka, Kansas, with him on the brief) for Defendants-Appellees.

Before **EBEL**, **KELLY**, Circuit Judges, and **BRATTON**,* District Judge.

EBEL, Circuit Judge.

This 42 U.S.C. § 1983[1] action challenges the decision of a

* The Honorable Howard C. Bratton, Senior United States District Court Judge for the District of New Mexico, sitting by designation.

1. Section 1983 provides, in relevant part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution

(Cont'd)

number of state mental health administrators ("Defendants")[2] to terminate a special unit in a mental hospital that was reserved for the criminally insane. Plaintiff-Appellant Gregg Uhlrig ("Plaintiff"), as the executor of the estate of his deceased wife, Stephanie Uhlrig ("Uhlrig"), alleges that Defendants' reckless decision to terminate the special unit led to the placement of Kenneth Waddell ("Waddell"), a member of that special unit, into the general hospital population where Uhlrig worked as an activity therapist. Plaintiff further asserts that this chain of events ultimately caused Uhlrig's death. Thus, Plaintiff claims that Defendants are liable under § 1983 for violating Uhlrig's substantive due process rights by recklessly creating the danger that led to her death. The district court rejected this claim and ruled for Defendants on summary judgment, determining that Plaintiff failed to demonstrate that Defendants acted recklessly, and that, in any event, Defendants qualified immunity shielded them from liability. We affirm.[3]

(Cont'd)

> and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

2. Plaintiff-Appellant originally named the State of Kansas as a defendant, but the district court dismissed the claims against the state on Eleventh Amendment grounds. Thus, as Plaintiff-Appellant does not contest that decision, the state is not a party to this appeal.

3. Plaintiff also requests that we reverse the district court's order of summary judgment because Defendants submitted additional affidavits to the district court with their Summary Judgment Reply Brief. However, because the evidence submitted therein was not necessary to support the district court's decision, we decline to reverse the district court's order on that ground. We also reject Plaintiff's counsel's motion to strike and to sanction Defendants' counsel for making material misrepresentations at oral argument.

Appendix C

I. BACKGROUND

Uhlrig worked as a music and activity therapist at the Topeka State Hospital. One of the patients at Topeka State Hospital was Waddell, who had been placed in the custody of state mental health authorities after having been found not guilty by reason of insanity for the charge of aggravated battery. Waddell was initially placed in the Larned State Security Hospital, but on April 1, 1987, he was transferred to the Topeka State Hospital where he was placed in the Adult Forensic Ward (referred to as the "AWL unit"), which was a special unit secluded from the other units because it contained higher risk patients. After three months in the AWL unit, Waddell's treatment team recommended that the hospital place him into a regular unit. However, after over a year in a regular unit, the hospital transferred Waddell back to the AWL unit because he had gone AWOL (and then voluntarily returned to the hospital) and the County Attorney who originally prosecuted him complained of Waddell's AWOL and requested that the hospital provide greater security. In March of 1991, while back in the AWL unit, Waddell had a physical altercation with a staff member and was placed in restraint.

Due to budgetary constraints, Robert Harder, Acting Secretary of the Department of Social and Rehabilitative Services, and George Vega, Acting Commissioner of Mental Health and Retardation Services, decided to close the AWL unit. Dr. Mani Lee, Director of Mental Health Services, informed both Vega and Harder in a detailed memorandum that, as the AWL unit had been specially created to avoid mixing "murderers with my mother" and to serve high risk patients in a highly structured environment, a careful phase-out period would be necessary were the AWL unit to be closed. On June 21, 1991, Vega authorized Karen Thompson, who was the Acting Supervisor of Topeka

State Hospital at the time of the phase-out, to close the AWL unit "in the most expeditious manner possible" so as to place the AWL patients into other appropriate wards. To administer the phase-out of the AWL unit, the hospital's Patient Care Consultation Team ("PCCT") met with the AWL treatment team and consulted with the nursing staff to determine where to place the patients who resided in the AWL unit. Defendants emphasize that they personally were not involved in the outplacement process from the AWL unit and did not examine the files of those residing in the unit, but rather broadly delegated this task to those with clinical expertise. Thus, none of the defendants personally participated in the process of determining where or how to outplace Waddell.

As a result of the phase-out, the PCCT recommended that the hospital transfer Waddell to Rappaport South, the unit in which he resided prior to being referred back to the AWL unit. After the transfer, Waddell raped and assaulted a female patient; as a result, he was then transferred to Boisen South, another unit in the general population, where Uhlrig worked as an activity therapist. When Waddell was transferred to the Boisen South Ward, Uhlrig's supervisor, who had previously alerted Uhlrig to the general dangers inherent in her job, specifically called Uhlrig's attention to Waddell's background and confirmed with Uhlrig that she had no problem escorting Waddell off grounds and working with him. Plaintiff concedes that Uhlrig had access to Waddell's files and may have made entries in them, but claims that such access (and any such entries in Waddell's files) do not establish that she understood that Waddell could pose a threat to her safety. Furthermore, upon taking her position, Uhlrig signed a job description informing her that she would work with patients who were potentially asaultive and/or combative. In addition, Sally Schaffer, who trained Uhlrig as a music therapist, stated that she also communicated to Uhlrig that Uhlrig might be

harmed by some patients in the hospital. Finally, Uhlrig's training period included instruction in how to reduce the risks of injury posed by potentially violent patients.

On February 23, 1992, Uhlrig and another therapist took Waddell and other patients off grounds to watch a movie. Upon returning to the hospital and dropping off the other patients, Waddell attacked and killed Uhlrig, and her body was found in the bathroom in one of the buildings on the grounds. Uhlrig's estate and heirs then brought this action predicated upon her substantive due process rights as well as a number of pendent state law tort claims. The district court dismissed Plaintiffs' state law tort claims as barred both by the Kansas worker's compensation laws and by Defendants' discretionary function immunity under Kansas law. Moreover, the district court dismissed the State of Kansas as a defendant on Eleventh Amendment grounds, and it dismissed Uhlrig's husband and children as plaintiffs (in their role as surviving family members), and only allowed Uhlrig's estate to proceed in this action.[4]

Finally, the district court granted Defendants motion for summary judgment on Plaintiff's § 1983 claim, ruling that (1) Defendants' actions were not reckless; and (2) in any event, they were protected by their defense of qualified immunity. In ruling that Defendants were not reckless, the court concluded that (1) Defendants did not know of the danger that Waddell posed to Uhlrig; nor (2) did Defendants willfully conceal any evidence of that danger or mislead Uhlrig. In fact, the court found that Uhlrig understood the potential dangers she faced at work. Plaintiffs now appeal.

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4. Plaintiff accepts these adverse rulings and solely appeals the ruling dismissing the estate's § 1983 claim.

Appendix C

II. DISCUSSION

In granting Defendants' motion for summary judgment based on qualified immunity, the district court correctly followed the approach set forth in *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). That is, the court first determined that, under the facts of the instant case, Plaintiffs failed to state an actionable claim, and then concluded that, even if Plaintiff's claim was actionable, it was not clearly established under the law of the Tenth Circuit. In reviewing the district court's rulings, we also follow the approach set forth in *Siegert*, and affirm.

We review the district court's grant of summary judgment by applying the same legal standard used by the district court pursuant to Fed. R. Civ. P. 56(c). *Universal Money Ctrs., Inc. v. AT&T*, 22 F.3d 1527, 1529 (10th Cir.), *cert. denied*, 115 S. Ct. 655 (1994); *Applied Genetics Int'l Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). That is, we first consider whether there is a genuine issue of material fact in dispute; if not, then we must determine if the district court correctly applied the substantive law. *Applied Genetics*, 912 F.2d at 1241. In determining whether there is a genuine dispute of material fact, "we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Applied Genetics*, 912 F.2d at 1241.

In order to prevail on their substantive due process claim, Plaintiff must demonstrate that the state acted in a manner that " 'shock[s] the conscience.' " *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 126 (1992) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)). Moreover, as the conduct complained of in the instant case was committed by a private third party (i.e. Waddell) rather than by a state actor, Plaintiff must demonstrate

either (1) the existence of a special custodial relationship between the plaintiff and the state; or (2) that the state recklessly created the danger that caused the constitutional violation. *See Graham v. Independent Sch. Dist. No. I-89*, 22 F.3d 991, 994-95 (10th Cir. 1994). Here, Plaintiff relies on the danger creation theory to meet the state action requirement. However, we conclude that the district court properly granted summary judgment to Defendants because Plaintiff failed to raise a genuine dispute of fact that Defendants (1) recklessly created the danger that led to Uhlrig's death; or (2) acted in a "conscience shocking" manner.

A. State Action Requirement

While state actors are generally only liable under the Due Process Clause for their own acts and not for private violence, *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196-97 (1989),[5] there are two recognized two exceptions to this rule: (1) the special relationship doctrine; and (2) the "danger creation" theory. A special relationship exists when the state assumes control over an individual sufficient to trigger an affirmative duty to provide protection to that individual (e.g. when the individual is a prisoner or involuntarily committed mental patient). *See id.* at 199-200 (explaining that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being"). This theory is inapplicable to the instant case because Uhlrig was simply an employee of the state working at the Topeka

5. This general rule is rooted in the text of the Fourteenth Amendment Due Process Clause, which only applies to state actors. The Due Process Clause specifies that "... nor shall *any State* deprive any person of life, liberty, or property, without due process of law ...." U.S. Const. amend. XIV (emphasis added).

State Hospital, and an employment relationship is consensual in nature.

A state also may be liable for an individual's safety under a "danger creation" theory if it created the danger that harmed that individual — that is, provided that the other elements of a § 1983 claim have been satisfied. *See Medina v. City and County of Denver*, 960 F.2d 1493, 1495-99 (10th Cir. 1992) (explaining that police officers who engaged in a high speed car chase could be liable for creating a special danger faced by a bicyclist, but were protected in that case by their shield of qualified immunity).[6] The classic case of state actors creating a danger so as to give rise to § 1983 liability is *Wood v. Ostrander*, where police officers placed plaintiff in danger by impounding her car and abandoning her in a high crime area at 2:30 a.m., thereby "distinguish[ing] Wood from the general public and trigger[ing] a duty of the police to afford her some measure of peace and safety." 879 F.2d 583, 589-90 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990).

However, many state activities have the potential for creating some danger — as is true of most human endeavors — but not all such activities constitute a "special" danger giving rise to § 1983 liability. For the state to be liable under § 1983 for creating a special danger (i.e. where a third party other than a state

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6. *Graham* explained that "[m]any courts have noted that *DeShaney* . . . leaves the door open for liability in situations where the state creates a dangerous situation or renders citizens more vulnerable to danger. This state-created danger doctrine necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger." 22 F.3d at 995 (quotations omitted).

Judge Posner offered the classic and oft-quoted metaphor for a state-created danger: "[i]f a state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

actor causes the complained of injury), a plaintiff must allege a constitutionally cognizable danger. That is, the danger creation theory must ultimately rest on the specifics of a substantive due process claim — i.e. a claim predicated on reckless or intentionally injury-causing state action which "shocks the conscience."[7] As explained by the Fifth Circuit in *Leffall v. Dallas Indep. Sch. Dist.*, "it is not enough to show that the state increased the danger of harm from third persons; the [§] 1983 plaintiff must also show that the state acted with the requisite degree of culpability in failing to protect the plaintiff." 28 F.3d 521, 531 (5th Cir. 1994). As discussed *infra*, Plaintiff here has failed to demonstrate that Defendants acted with the requisite degree of culpability or in a "conscience shocking" manner.

B. The "Shock the Conscience" Standard

The recent case of *Collins v. City of Harker Heights Tex.*, 503 U.S. 115 (1992), offers some guidance in considering the scope of substantive due process violations. There, the Court explained that the standard for judging a substantive due process claim is whether the challenged government action would " 'shock the conscience' of federal judges." *Collins*, 503 U.S. at 126 (quoting *Rochin*, 342 U.S. at 172). In *Collins*, the representative of a decedent sued the City under § 1983 for providing an unsafe workplace when it caused a worker to enter a sewer without adequate ventilation and the worker died as a result. The Court

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7. The Supreme Court planted the seed for such a "creation of danger" theory in explaining the case of Joshua DeShaney: "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it *played no part in their creation*, nor did it do anything to render him *any more vulnerable to them*." *DeShaney*, 489 U.S. at 201 (emphasis added); *see also Medina*, 960 F.2d at 1497 n.5 (distinguishing *DeShaney* on the grounds that it does not absolve the state of liability when the state affirmatively and directly changes the status quo by knowingly or recklessly placing the plaintiff in grave danger).

held that the City did not violate the worker's substantive due process rights, explaining that "[t]he Due Process Clause 'is not a guarantee against incorrect or ill-advised [government] decisions.' Nor does it guarantee municipal employees a workplace that is free of unreasonable risks of harm." *Id.* at 129 (quoting *Bishop v. Wood*, 426 U.S. 341, 350 (1976)). In so ruling, *Collins* underscored the oft-repeated principle that a substantive due process violation must be more than an ordinary tort to be actionable under § 1983. *Id.* at 128; *see also Martinez v. California*, 444 U.S. 277, 285, *reh'g denied*, 445 U.S. 920 (1980) ("Although § 1983 has been described as a species of tort liability, it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute.") (internal quotation omitted).

In order to discern whether the facts of the instant case "shock the conscience" so as to rise to the level of a substantive due process violation, we must bear in mind three basic principles highlighted by the Supreme Court in evaluating substantive due process claims: (1) the need for restraint in defining their scope, *Collins*, 503 U.S. at 125; (2) the concern that § 1983 not replace state tort law, *DeShaney*, 489 U.S. at 202; *Medina*, 960 F.2d at 1495; and (3) the need for deference to local policymaking bodies in making decisions impacting upon public safety, *Collins*, 503 U.S. at 128-29. Consistent with these principles and our prior cases, *see. e.g.*, *Graham*, 22 F.3d 991; *Medina*, 960 F.2d 1493, *Collins* explained that the Due Process Clause's protection against "conscience shocking" conduct traditionally only involved deliberately wrongful government decisions rather than merely negligent government conduct. 503 U.S. at 127 n.10. *Collins'* focus on deliberateness coheres with our previous recognition that a § 1983 violation must be predicated on a state action manifesting one of two traditional forms of wrongful intent — that is, either: (1) an intent to harm; or (2) an intent to

place a person unreasonably at risk of harm.[8] *Medina*, 960 F.2d at 1496. While "an intent to harm" follows the traditional tort law concept of intentionality, we have defined "an intent to place a person unreasonably at risk" (or reckless conduct) as when a state actor "was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences." *Id.*[9]

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8. This latter form of intent is frequently referred to as "reckless" conduct. *See Medina*, 960 F.2d at 1496. It differs from the non-intentional torts of negligence or gross negligence because, in reckless conduct, the defendant recognizes the unreasonable risk and actually intends to expose the plaintiff to such risks without regard to the consequences to the plaintiff. *See Woodward v. City of Worland*, 977 F.2d 1392, 1399 n.11 (10th Cir. 1992) ("[R]ecklessness is generally regarded as satisfying the scienter requirement of section 1983 because it requires proof that the defendant focused upon the risk of unconstitutional conduct and deliberately assumed or acquiesced in such risk."), *cert. denied*, 113 S. Ct. 3038 (1993); *Archuleta v. McShan*, 897 F.2d 495, 499 (10th Cir. 1990) ("[R]ecklessness includes an element of deliberateness — a *conscious*, acceptance of a known, serious risk.") (emphasis in original) (citation omitted); *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc) (recklessness contains an intent component because the "reckless disregard of a great risk is a form of knowledge or intent"), *cert. denied*, 489 U.S. 1065 (1989).

9. Other circuits have read *Collins* as consistent with *Medina*'s position that reckless intent suffices to give rise to § 1983 liability. *See Leffall*, 28 F.3d at 531 (deliberate indifference suffices to state a substantive due process claim); *L.W. v. Grubbs*, 974 F.2d 119, 122-23 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2442 (1993) (same). *But see Lewellen v. Metropolitan Gov't of Nashville and Davidson County, Tenn.*, 34 F.3d 345, 351 (6th Cir. 1994) (while not specifically addressing reckless intent as defined in *Medina*, explaining that a "non-intentional tort" does not suffice to state a substantive due process claim), *cert. denied*, 115 S. Ct. 903 (1995); *Fagan v. City of Vineland*, 22 F.3d 1296, 1306-08 (3d Cir. 1994) (en banc) (reckless intent does not suffice to state a substantive due process violation)

However, to satisfy the "shock the conscience" standard, a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. That is, the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking. The level of conduct required to satisfy this additional requirement cannot precisely be defined, but must necessarily evolve over time from judgments as to the constitutionality of specific government conduct. We do know, however, that the "shock the conscience" standard requires a high level of outrageousness, because the Supreme Court has specifically admonished that a substantive due process violation requires more than an ordinary tort and that merely allowing unreasonable risks to persist in the workplace is not necessarily conscience shocking. *Collins*, 503 U.S. at 128.

C. Did Defendants Recklessly[10] Create A Special Danger To Uhlrig That Shocks the Conscience?

Merging the above concepts and applying them to the facts of the instant case, Plaintiff must demonstrate that (1) Uhlrig was a member of a limited and specifically definable group; (2) Defendants' conduct put Uhlrig and the other members of that group at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking. *See*

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10. Plaintiff does not allege that Defendants acted with the intent to harm Uhlrig (or any other staff member), so here we are dealing only with the second kind of cognizable intent under § 1983 — that the state acted recklessly by deliberately placing Uhlrig (or hospital employees as a well-defined group) unreasonably at risk of the known danger posed by the threat of an assault by a former AWL unit patient when it closed the AWL unit.

Collins, 503 U.S. at 126-30; *Medina*, 960 F.2d at 1496. At least at the summary judgment stage, Plaintiff has raised a fact issue as to the first and third factors regarding whether Uhlrig was part of a limited and specifically defined group which would face the risk posed by the closing of the AWL unit and the outplacement of Waddell; and whether Defendants knew that they were creating such a risk of harm.[11] However, Plaintiff has failed to raise a genuine dispute of fact as to the second, fourth and fifth factors comprising a reckless creation of danger claim.

With regard to the second factor, Plaintiff did not produce evidence that the decision to close the AWL unit (and the placement of Waddell into the general hospital population) created a high probability of a serious and substantial harm.[12]

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11. Whether Defendants knew that they were creating a risk by terminating the AWL unit and outplacing Waddell (and the other former patients) presents a close question. Plaintiff argues that Defendants knew of the risk because (1) Defendants had access to Waddell's files, (2) knew that the AWL unit was created to prevent the mixing of "murderers with my mother," and (3) were warned in memoranda of the possible danger posed by reassigning some of the AWL patients. Defendants respond that the only knowledge that they possessed as to the potential danger of the closure of the AWL unit was that the process of reassignment needed to be conducted carefully and that they carefully managed the outplacement process by warning the hospital employees of any added risk and by delegating authority over the outplacement process to the clinical expertise of the PCCT. However, even with these precautions, we cannot conclusively determine that Defendants were not aware of any risk arising from the termination of the AWL unit; thus, we would not affirm summary judgment on this ground.

12. The relevant risk can be viewed as the risk posed by all former AWL unit patients. *See Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348, 357 (11th Cir. 1989) (analyzing the risk posed to Town Hall workers by the regular use of violent offenders — as opposed to any specific violent offender — as part of a work-release program), *cert. denied*, 494 U.S. 1066 (1990). However, as Plaintiff mostly focuses on the risk posed by the specific placement of Waddell into the general hospital population, our analysis also focuses primarily on the threat posed by Waddell.

Appendix C

While Waddell had attacked a patient before, he had also spent over a year in the general hospital population without incident. Furthermore, the fact that Defendants warned all employees of the potential risk inherent in their job, and specifically warned Uhlrig about Waddell, also lessened the general threat posed by the former AWL unit patients.[13] The evidence concerning Uhlrig's knowledge as to the dangers she faced stemmed from several sources: (1) her access to Kenneth Waddell's file; (2) the warnings provided to her in her job description; (3) the warnings provided to her during her training; (4) the discussions with her supervisor both about the general possibility of danger as well as concerning the specific background of Waddell; and (5) Kansas's standards for civil commitment.[14] We view these warnings as sufficient to minimize the risk inherent in her job,[15] so that the risk

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13. Plaintiffs suggest that Uhlrig's knowledge of any potential danger was irrelevant as "the cause of action plaintiffs advance does not depend only on Stephanie Uhlrig not being warned, but instead relies also on the evidence that she could not defend herself" against the danger created by Defendants' reckless actions. Appellant Rep. Br. at 15. However, we view the warnings given to Uhlrig as relevant to the inquiry into whether Defendants acted recklessly for two reasons. First, with regard to the instant case, any warnings given to Uhlrig necessarily limited the danger that she faced at work because she could have taken precautions so as not to have been in a situation where she could not defend herself. Second, on a more general level, because many employment situations may contain some inherent risk, we cannot hold public employers liable under § 1983 for dangers arising from that risk if they have sufficiently warned their employees.

14. Those standards specified that an individual can be confined in a mental hospital if he or she "is likely to cause harm to self or others if not immediately detained." Kan. Stat. Ann. § 59-2909(b)(3).

15. As the Fifth Circuit explained, public employees "are under no compulsion to submit to unsatisfactory working conditions and may quit whenever they please." *Leffall*, 28 F.3d at 528. Of course, if the state misled a public employee as to his or her working conditions, this rationale would be inapplicable and the state could be held liable under § 1983.

facing Uhlrig could not fairly be described as presenting a substantial risk of serious harm. Indeed, the authority presented by Plaintiff does not establish that the state must warn its employees of all risks in the workplace, but merely that if the state affirmatively misleads an employee of the substantial risks in the workplace, that action may give rise to § 1983 liability.[16]

With regard to the fourth factor, we do not believe that the creation of the risk posed by the closure of the AWL unit or the placement of Waddell into the general hospital population was reckless. That is, Defendants did not act in conscious disregard of a known and serious risk in deciding to close the AWL unit. To the contrary, they set up procedures to address the (arguably) known risk, delegating the assignment process to the clinical expertise of the PCCT. Moreover, we note that we must be careful not to second guess Defendants' decisions based on the benefit of hindsight, especially where their decision stemmed from a balancing of "competing social, political, and economic forces." *Collins*, 503 U.S. at 128. As noted by the Supreme Court, decisions concerning the allocation of resources "involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country." *Id.* at 129.

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16. *Compare Grubbs*, 974 F.2d at 121, 123 (assigning § 1983 liability based on a creation of danger theory where the employee had been led to believe that she would not work with dangerous persons and the employer then left her alone with a dangerous person); *Cornelius*, 880 F.2d at 350, 359 (holding that town clerk who was told that only non-violent inmates would participate in work program had a cause of action against town after it used a violent inmate who then attacked her) *with Collins*, 503 U.S. at 125-26 (city not liable for hazards of sewer when employer did not actively mislead the employee as to danger he faced); *Lewellen*, 34 F.3d at 347, 351 (public employer not liable for creating a dangerous situation by exposing an employee to electrocution where the employee was not misled as to the nature of the threat).

Here, Defendants faced difficult allocational decisions precipitated by budgetary constraints, and even if their decisions created certain risks, we view them as within the province of policymakers who must balance competing concerns.

Finally, the fifth factor requires us to look at the conduct as a whole to determine whether it "shocks the conscience." Here, none of the defendants intended to injure Uhlrig or any other hospital staff by the decision to close the AWL unit, nor were they indifferent to the risk that would be created by such action. They established a procedure whereby trained professionals would make the actual assignments of the AWL patients. Moreover, the hospital staff members all were warned of the general risks inherent in their jobs, and Uhlrig specifically was aware of Waddell's background. Defendants did not affirmatively mislead Uhlrig about the risks that she and her fellow workers faced as a result of such choices. Defendants did not abuse their power or act in an arbitrary and oppressive manner; rather, Defendants' actions resemble those typical of legitimate governmental decisions in times of scarcity — that is, the making of difficult policy choices to reconcile various competing social, political and economic forces. Therefore, on these facts, we have no difficulty concluding that Defendants did not engage in any conduct that was so egregious, outrageous and fraught with unreasonable risk so as to shock the conscience.

D. Qualified Immunity

In accordance with the approach set forth in *Siegert v. Gilley*, 500 U.S. 226, 232 (1991), we first concluded that Plaintiff clearly failed to satisfy the substantive requirements for stating a § 1983 claim against Defendants based on a substantive due process violation arising from the acts of a third party — i.e. a non-

governmental actor. Second, to the extent that Plaintiff is asking us to extend the scope of § 1983 liability, we still would not assign § 1983 liability to Defendants because such an extension is not directly supported by any controlling precedent (and indeed, is undercut by *Medina*). We conclude that Defendants acted in an objectively reasonable manner based on what "a reasonably competent public official [would] know [of] the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982); *Medina*, 960 F.2d at 1498 (in order to overcome a defense of qualified immunity, a plaintiff must demonstrate that either a Tenth Circuit or Supreme Court case controls the issue or that the clearly established weight of authority supports plaintiff's claim). Thus, we also affirm the district court's judgment that Defendants are protected from liability by their shield of qualified immunity.

CONCLUSION

While Uhlrig's murder was undeniably tragic, it was not the result of reckless and "conscience shocking" conduct by the state mental health administrators sued in the instant case. Section 1983 does not convert all harms into substantive due process violations, but rather only provides a cause of action for those reckless government actions which "shock the conscience." Here, we conclude that the record establishes that Defendants did not (1) put Uhlrig at substantial risk of serious harm; (2) act recklessly in conscious disregard of such risk; or (3) act in a "conscience shocking" manner. Thus, the district court properly granted summary judgment for Defendants both on the merits of Plaintiff's claim as well as based on Defendants' qualified immunity defense. Therefore, we AFFIRM the district court's grant of Defendants' motion for summary judgment.